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In the Supreme Court of the United States

DAVID MCFARLAND, PARENT AND NEXT FRIEND OF STEPHEN AND DANIEL MCFARLAND, ET AL.,

Petitioners,

V.

JEFFERSON COUNTY PUBLIC SCHOOLS, ET AL.,

Respondents,

AND

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

V.

SEATTLE SCHOOL DISTRICT, NO. 1, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

BRIEF AMICUS CURIAE OF THE BLACK WOMEN LAWYERS' ASSOCIATION OF GREATER CHICAGO, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Black Women Lawyers' Association of Greater Chicago, Inc. ("BWLA") is an association of African-American female lawyers, judges, law professors and law students whose mission is to provide professional support for the continued presence and participation of African-American women in the legal profession. Thus, BWLA's interest in these cases is substantial. BWLA is in a unique position to provide a perspective on issues which may not adequately be covered by the parties in their briefs or by the other *Amici* before this Court. Specifically, BWLA's perspective is unique because many of its members have been beneficiaries of public elementary and high school programs which used race as a factor in school assignment policies in order to desegregate schools. Moreover, many of BWLA's members have been beneficiaries of college, university and law school admissions programs designed to create diverse applicant pools and student bodies and to increase the racial diversity within the legal profession. As an organization whose membership includes attorneys, law professors, and judges, BWLA is in a unique position to describe the experience of practicing law as an African-American lawyer today---more than 50 years after this Court's decision in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954).

A ruling proscribing the consideration of race as a factor, among others, in educational assignment decisions in public elementary and secondary schools would dramati-

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* affirm that no counsel for any party in this case authored this brief in whole or in part. No person or entity, outside of *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

cally affect the environment in which children learn. Such a ruling is likely to return us *de facto* to educational environments which existed during *de jure* segregation. A diverse educational environment helps to deconstruct the conscious and unconscious racial biases against African-Americans which remain in our society as vestiges of our history of slavery and *de jure* segregation. A ruling overturning this Court's recent decision in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), as sought by some *Amici*, would dramatically reduce the number of African-American students admitted to our nation's institutions of higher learning, and thereby curtail professional and other opportunities reserved for those with college and graduate levels of education.

Our members' opportunity for full participation in the legal system is likely to be determined by the outcome of this case. As African-American attorneys and judges, our participation in the legal system is critical to the public's perception that our system of justice is fair, open and inclusive. Finally, a ruling eliminating the consideration of race as a factor in creating diverse and non-segregated educational settings would have a devastating impact on efforts to diversify the legal profession and to remedy past and present discrimination against African-Americans. Such a ruling would likely eliminate the possibility of ever achieving a day when race no longer matters in America.

SUMMARY OF ARGUMENT

Race still plays a part in the lives of every American. History, statistical evidence, case law, and the personal and professional experiences of our members demonstrate the important role that race plays in America. As long as race remains a factor in American life, race must remain a factor in the educational system to ensure that educational opportunities are provided to African-Americans after

hundreds of years of deprivation. Moreover, race must remain a factor to ensure that educational environments are diverse and non-segregated in order to teach both whites and non-whites about each other so that we may reach the day when race no longer matters.

Being educated in a multiracial setting enhances students' knowledge of different cultures and their understandings of perspectives that are influenced by race. This is as true in elementary and secondary school settings as in institutions of higher education. Furthermore, it is only through contact with other races that we begin to break down the racial stereotypes and conscious and unconscious biases which history has engrained in our society. Our members now confront these negative racial stereotypes and conscious and unconscious biases in our daily work and in all aspects of our lives.

At issue in the cases before the Court is the government's voluntary decision to consider race as one factor, among others, to integrate public elementary and secondary schools and to ensure a diverse educational environment. *Grutter* supports the government's compelling interest in student diversity in elementary and secondary education just as it does in higher education. Society's interest in preparing its citizens to participate in a multicultural democracy dictates that learning be conducted in diverse environments. Our members' experiences demonstrate the value obtained from a diverse education and the burdens of working in environments where issues of race are improperly managed. For all of the foregoing reasons, the Respondents' school assignment policies should be upheld.

ARGUMENT

I. The Government's Consideration Of Race In Public School Assignments Furthers A Compelling Interest In Educating Students And In Eliminating The Vestiges Of *De Jure* Segregation

The Court in *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003), held that student body diversity is a compelling state interest that can justify the consideration of race in university admissions. In reaching this decision, the Court recognized that context matters when reviewing governmental actions involving race under the terms of the Equal Protection Clause. *Id.* at 327. *Grutter* acknowledged the substantial benefits of education with a diverse student body: "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society and better prepares them as professionals.'" *Id.* at 330. Moreover, the Court relied on two other reasons to recognize student body diversity as a compelling interest: first, "that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints," *ibid.*, and second, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332.

In upholding the University of Michigan Law School's position that a "critical mass" of underrepresented minorities is necessary to provide a diverse education, *id.* at 318, the Court recognized that race still matters in our society. "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of

being a racial minority in a society, like our own, in which race unfortunately still matters." *Id.* at 333.

The constitutionality of race-conscious remedial measures is well established. Several school desegregation cases have recognized that even absent a judicial or legislative finding of a constitutional violation, a school board could constitutionally consider the race of students in making school assignment decisions. *See, e.g., Swann* v. *Charlotte-Mecklenburg Bd of Educ.*, 402 U.S. 1, 16 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971). Accordingly, Respondents' policies of considering race in their school assignment plans are merely an effort to comply with the parameters of *Brown*. Therefore, this Court should support the continued desegregation of educational systems and allow race to be utilized as one factor, among others, in remedying *de facto* segregation.

II. America Is Not Now, And Never Has Been, A Color-Blind Society

In reviewing governmental actions involving race under the Equal Protection Clause, context matters. *See Grutter*, 539 U.S. at 327. The Respondents' actions in these cases occurred within the context of race in America, in general, and the experience of African-Americans, in particular. The experience of African-Americans in America has been an experience rife with discrimination and second-class citizenship based on race.

During slavery, African-Americans endured a lifetime of bondage and treatment as human chattel, sold as easily as one would sell a piece of clothing. Slavery provided the mechanism that promoted and maintained white racial dominance. Enslaved African-Americans had no rights. It was illegal for African-Americans to learn to read or to become educated, nor could they congregate among them-

selves. Additionally, African-American families were routinely and systematically separated. Children were sold away from their parents and wives were sold away from their husbands. *See generally* John Hope Franklin, FROM SLAVERY TO FREEDOM (4th ed. 1974); Richard Kluger, SIMPLE JUSTICE (1975).

Despite its articulated ideals of equality and democracy, simultaneously the United States Constitution recognized slavery and expressly prohibited legislation on the "[i]mportation" of slaves until 1808. U.S. Const. art. I, § 9, cl. 1. Moreover, slaves were considered three-fifths of a person for apportionment purposes, although they had no right to participate in governance. U.S. Const. art. I, § 2, cl. 3. If a slave escaped into free territory, the Constitution required that the slave be returned to his or her rightful "owner" upon request. U.S. Const. art. IV, § 2, cl. 3.

This Court played a role in promoting and enforcing laws which treated African-Americans as inferior and affirmed whites as superior. *See, e.g., The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *Groves* v. *Slaughter*, 40 U.S. (15 Pet.) 449 (1841); *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). In *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 407 (1856), denying a slave's claim for freedom, Chief Justice Taney wrote that African-Americans were not citizens of the United States because African-Americans were "an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."

In the post-Civil War Era, the Court determined that the "pervading purpose" of the Civil War Amendments was to emancipate former slaves. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872). Despite this interpretation, the Court later approved legalized segregation under

the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), thereby, maintaining the subjugation of African-Americans.

The "separate but equal" legal doctrine continued largely unabated well into the twentieth century. In a series of cases, the inequality of separate educational facilities for African-Americans was challenged. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950). In *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), this Court explicitly rejected racial segregation in education. In reaching its decision, the Court gave great weight to the negative psychological effects of attending segregated schools and the implied inferior status of African-American children. *Id.* at 494. Writing for a unanimous Court, Chief Justice Warren stated that "[s]eparate educational facilities are inherently unequal." *Id.* at 495.

Despite the Court's decision invalidating *de jure* school segregation, many school boards either refused to comply with *Brown* or significantly delayed its implementation. One year after the original *Brown* decision, the Court mandated school desegregation with "all deliberate speed" and required "good faith compliance at the earliest practicable date." *Brown* v. *Board of Educ.*, 349 U.S. 294, 300-01 (1955); *see also Watson* v. *City of Memphis*, 373 U.S. 526 (1963); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Griffin* v. *County Sch. Bd.*, 377 U.S. 218 (1964).

For almost 20 years after *Brown*, school districts blatantly refused to desegregate their once *de jure* segregated schools. In *Green* v. *County School Board*, 391 U.S. 430, 435-36 (1968), the Court defined desegregation as the elimination of prior segregationist policies in every aspect of a school, which included student and teacher assign-

ment. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-18, 29-30 (1971), endorsed judicial oversight of desegregation plans and allowed the use of busing to achieve integration.

Given the history of racial discrimination against African-Americans and the disparities among races which continue to exist, states have a compelling interest in providing schools with diverse student bodies. Indeed, this Court has validated that interest as long as the remedy is narrowly tailored. *Grutter*, 539 U.S. at 333.

A. Statistical Evidence Demonstrates that the Effects of *De Jure* Segregation Persist

The elimination of *de jure* discrimination against African-Americans did not end the effects of hundreds of years of government-sanctioned racial discrimination. The vestiges of *de jure* segregation continue to destroy communities, families and the hearts and minds of those who are forced to endure day to day injustice based on race. Recently, in the aftermath of Hurricane Katrina, the racial disparities between African-Americans and whites were magnified as the world watched thousands of African-Americans wade through debris, human feces and dead bodies with no help in sight. The horrific images of American citizens abandoned by their government served as a very painful reminder that race still matters in this country.

Racial disparities persist in every aspect of our society including employment opportunities, earning potential, housing and healthcare. In the employment arena, racial discrimination is an unfortunate reality that continues to burden society and contradicts the ideals of fairness and justice for all. It was only nine years ago that Texaco, the United States' third-largest oil company, was scandalized

by a disclosure of a secret tape of senior officials referring to African-Americans as "black jelly beans" who were "glued to the bottom of the jar." *See* Susan L. Brinson & William Benoit, *The Tarnished Star: Restoring Texaco's Damaged Public Image*, 12 MGMT. COMMUNICATION Q. 483, 484 (1999). Clearly, the statements evidenced racial bias by the senior officials. *See Roberts* v. *Texaco, Inc.*, 979 F. Supp. 185, 190 (S.D.N.Y. 1997).

Further, statistical data reveals that institutional racism and racial segregation drastically reduce employment opportunities for African-Americans. *See* David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 406 (2001). Some corporations use race to determine the location of their facilities. *See ibid.* Often, major corporations will avoid areas where there is a high concentration of African-Americans and direct their attention to predominantly white suburbs. *See ibid.* Unfortunately, as more and more corporations move to the suburbs, so do high paying entry level jobs. *See ibid.* Additionally, when companies have to cut their workforce, African-Americans are disproportionately impacted by such measures. *See ibid.* For example, during the economic downturns in 1990-1991, the Wall Street Journal analyzed more than 35,000 companies and discovered that African-Americans were the only racial group that experienced a net job loss. *See ibid.* Since September 2001, African-American communities have been marked by economic stagnation. For example:

- More than one in ten African-Americans are now unemployed--more than twice the number of unemployed whites.
- In cities such as New York and Chicago, some estimates put the number of unemployed black males at 50%.
- Long-term African-American unemployment is now at a 20-year high.

TAVIS SMILEY *et al.*, THE COVENANT WITH BLACK AMERICA 166 (Third World Press 2006).

Overall, this data indicates that economic progress for African-Americans is declining with no hope in sight. *See id.*

Further evidence of the effect of continued racial discrimination is found in the disparity between the earning potentials of African-Americans and whites. In 1998, whites earned more than African-Americans and had lower levels of poverty. *See* David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 407 (2001). Even where whites and African-Americans have the same educational credentials, whites still earn more money.

Given the disparities in income between blacks and whites, there is a large gap between black and white wealth in this country. At every income level, African-Americans continue to fall short in building wealth. One major problem is that racial segregation dramatically impacts the value of homes in different areas. *See ibid.* African-Americans receive smaller investment returns on their homes than whites. *See ibid.* Accordingly, since home equity plays a significant role in building wealth, African-Americans are falling farther behind in their efforts to reverse economic stagnation in their communities. *See ibid.*

This country remains residentially segregated on the basis of race. African-American/white segregation in housing remains the most extreme of all residential segregation. Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 235 (1993). Housing is the market that determines one's schooling, peer groups, safety, jobs, insurance costs, public services, home equity, and ultimately, wealth. No other ethnic or racial group in the history of the United States has ever, even briefly, experienced the high levels of residential segregation that African-Americans face. Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, in 1 American Becoming 399, 401 (Neil J. Smelser et. al. eds., 2001).

Race does not just impact the socio-economic status of African-Americans. Race also affects the type of health care and medical attention received by African-Americans. Historically, the United States denied African-Americans proper healthcare on the basis of race. *See* Gerald E. Thomson, *Discrimination in Health* Care, 126 ANNALS OF INTERNAL MED. 910, 911 (1997). Over the last century, racial inequalities have continued to prevent African-Americans from receiving the medical attention needed to live a healthy life. TAVIS SMILEY, THE COVENANT WITH BLACK AMERICA 3 (Third World Press 2006). In 2000, racial disparities in the health care system led to 85,000 African-American deaths — 24,000 deaths from cardiovascular disease, 4,700 infant deaths, 22,000 deaths caused by diabetes and 2,000 deaths due to breast cancer. *See ibid.* All of these deaths could have been prevented if there were equal access to quality health care. *See ibid.*

Moreover, African-Americans are underrepresented in clinical trials for new drugs. *See* Marc Seitles, *The Perpetuation of Residential Racial Segregation in America:*

Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies, 14:1 J. LAND USE & ENVT'L LAW 89, 105 (1998-1999). They are less likely to undergo diagnostic testing or receive discretionary surgeries. *See* Thomson, *supra*, 126 ANNALS OF INTERNAL MED., at 910, 911. Unfortunately, our society and our health care system continue to afford limited access to African-Americans, which leads to unnecessary deaths in the African-American community.

The above statistics are consistent with our members' experiences and provide ample evidence establishing the overwhelming *present-day* discrimination faced by African-Americans in all facets of our lives. The one factor that has served to narrow the professional, housing and economic gaps is access to diverse educational opportunities for African-Americans. *See* Seitles, *supra*, at 89, 103-104. If school districts are precluded from using race as a factor to overcome racial segregation, the plight of the African-American community will remain tied to the legacies of our past.

B. Our Members' Experiences Demonstrate the Continuing Effects of *De Jure* Segregation

Justice Marshall wrote in *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 400 (1978) (Marshall, J. dissenting), that "[t]he experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups." The collective experiences of our members corroborate Justice Marshall's observation and underscore the necessity of integrated educational institutions at all levels. Below, we provide a representative sample of some of the experiences of our members to demonstrate that segregated public schools act as a significant sociological barrier for both African-Americans and whites alike.

One of our members describes growing up in Chicago during the late 1970's and early 1980's and attending college almost thirty years after *Brown* as follows:

> In approximately the eighth grade, I moved to a very racially segregated neighborhood on the south side of Chicago. The neighborhood was predominantly white. My family was the first black family on our block. I was one of only eight black students in my eighth grade class. I was called "nigger" and "little black girl" and shunned by all but the few black students in the class. Within one year of my family moving to our block, every white family on the block moved out and was replaced by black families. Not only did my block change over racially, but the entire neighborhood changed from white to black. During the first year, however, the police were at our house constantly due to the racial harassment my family faced. On several occasions, we were awakened to crosses burning in the yard. One night, someone set our garage on fire which caused the gas lawnmower inside to catch fire.
>
> In the late 1970's, after I graduated from high school, I went to the largest public university In Illinois. I was the only black person in my field of study. I was the only black person in classes in my major. Once, in a standing-room-only lecture hall, white students chose to stand as opposed to sit down in the empty seats next to me on either side or behind or in front of me.

Another of our members describes her experience growing up in Chicago and attending college, law school and practicing law since *Brown* as follows:

I grew up on the south side of Chicago in an all-black segregated neighborhood and attended public elementary and high schools in Chicago. In order to attend a high school with greater educational opportunities, my mother sent me to an integrated school outside my neighborhood. I finished near the top of my high school class and graduated from Harvard College with honors in 1977. I am the beneficiary of race-conscious admissions and I do not feel stigmatized by that fact. No other member of my family attended Harvard. I am the first lawyer in my family.

Since law school, I have worked in the legal departments of two Fortune 200 companies, two large law firms, one small law firm and a government legal department. In most of my jobs since law school, I have been the only black lawyer or one of less than a handful of black lawyers. On a few occasions, I was the first black lawyer or the first black female attorney to work at that company or firm. During my 21 years of practicing law, I have rarely been in a meeting in a business setting where another black person was present. These experiences made me feel very isolated and alone. For many of the white people with whom I have worked, their experience with me was their first meaningful experience with a black lawyer and, as a result, I often have had to spend time and energy trying to dispel the negative stereotypical assumptions they have about black women lawyers or black people, in general. I attribute all I have accomplished in my legal career to my hard work and the opportunity to attend Harvard College and Harvard Law School.

This member describes her experience with desegregation in the South after *Brown* and her experience in the practice of law in Chicago:

> In 1966, twelve years after *Brown*, a decree entered by the Court of Appeals for the Fifth Circuit finally brought integration to the schools in my southern home town. I, together, with two other young children, each day left my segregated community to attend a school on the other side of town. Although the schools were integrated, movie theaters, doctor's offices and the dressing rooms of many retail establishments remained segregated. I was ridiculed and taunted by white children who were opposed to my presence in the school. During most of my fourth grade year, my teacher referred to me as a "negress." In 1971, we moved to Chicago. After graduating from high school in the top two percent of my class, I attended the largest state university in Illinois. I was the only African-American student in the entire department in my field of concentration. Students ignored my presence and very few would offer me any assistance. I later attended law school and graduated in 1983. I joined the law department of a local public agency, where I was one of four African-American attorneys in an office of over 150 attorneys. I presently work as a partner in a large law firm. My years of practice have been marked by negative events arising solely from my race. My competence has been challenged repeatedly. I have been mistaken for the court clerk, judge's secretary and an office secretary. I have learned to live with a sense of isolation in the practice.

These experiences are provided as anecdotal evidence of the experience of African-American women lawyers. There are as many different stories as there are members of our organization. However, one thing is clear: African-American attorneys, and African-American women attorneys in particular, have experienced and continue to experience qualitatively different present-day work experiences based on racial misunderstanding and intolerance bred from the history of *de jure* segregation in our society.

C. *De Facto* Public School Segregation is as Powerful as *De Jure* School Segregation

Today, although *de jure* segregation no longer exists, *de facto* segregation manifests itself as a persistent vestige of *de jure* segregation negatively impacting the current and future advancement and success of African-American children and adults. *De facto* school segregation serves as a breeding ground for beliefs of racial superiority and inferiority.

Examine any city in America and one can easily see patterns of *de facto* segregation by race which are strongly linked to segregation by poverty. Clusters of poverty, in turn, are strongly linked to unequal opportunities and unequal outcomes for African-American students. Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School District* 1, 3 (Aug. 2002), available at http://www.civilrightsproject.harvard.edu (follow "Research" hyperlink, then follow "racial diversity" hyperlink). In fact, a recent study conducted by the University of Miami and the University of South Florida concluded that segregated schools are institutions of concentrated disadvantage. Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 1, 7 (Jan. 2005), available at http://www.civilrights

project.harvard.edu. Minority students who most often attend high-poverty public schools are more likely to face educational inequality due to a lack of resources, a dearth of experienced and credentialed teachers, lower parental involvement, and high teacher turnover. Chungmei Lee, Gary Orfield, & Erica Frankenberg, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 1, 35 (Jan. 2003), available at http://www.civilrights project.harvard.edu. The greater burden on administrators and veteran faculty presented with a relatively inexperienced faculty and particularly challenging student bodies complicates and compromises the opportunities to learn offered to all students in segregated African-American schools. *Id.* at 11.

Segregated minority schools overwhelmingly contend with the educational impacts of concentrated poverty (defined as having 50% or more of the student population eligible for free or reduced lunch), while segregated white schools are almost always middle class. Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* 2, 10 (July 2001) available at http://www.civil rightsproject.harvard.edu

De facto school segregation and its effect on African-American children is evidenced by declining test scores and increasing drop-out rates. *Ibid.* Indeed, state testing programs, which now publicly distribute testing data in almost all states, identify the lowest performing schools as those that are also segregated by race and economic standing. *Ibid.* The undeniable correlation between the percentage of poor students in a school and its average test scores leaves minority students in segregated schools facing a much less challenging educational curriculum. *Ibid.* The unavoidable result is that there are not enough minority students ready for advanced placement courses and

those courses are eliminated even for students who are ready because there are not sufficient students to fill a teacher's minimum student enrollment requirement. *Id.* at 11.

A study in the Journal of Negro Education researched the cumulative effects of attending a segregated minority elementary school. *See* Roslyn Arlin Mickerson, *The Effects of Segregation on African-American High School Seniors' Academic Achievement*, 68 J. NEGRO EDUC. 566, 582 (1999). The greater the proportion of a child's education that took place in a segregated African-American school, the lower his or her grades and the less likely the child was to be placed in college-bound tracks in secondary school. *See id.* at 577. The invisibility of this problem is shown by the fact that many colleges give special consideration to students who have taken advanced placement classes, ignoring the fact that such classes are far less available in segregated minority high schools. Orfield, *Schools More Separate, supra* at 11.

In contrast, racially diverse schools have benefits that are palpable. A recent research study by Professor Willis Hawley of the University of Maryland in Orfield & Lee, *Why Segregation Matters, supra*, at 42, reported the following evidence on the cognitive impacts of diverse educational institutions:

- African-American and Hispanic students learn more in schools that are majority white than in schools that are predominantly minority.

- The earlier students experience racially desegregated learning environments, the greater the positive impact on achievement.

- The integration of schools that remain majority white appears to have no negative effect on white students.

However, white students in predominantly non-white schools may achieve at lower levels than students from similar socio-economic backgrounds who attend majority white schools.

There are a variety of things that children learn in inter-racial schools about understanding and working together with people of other racial and ethnic backgrounds---things that are difficult or impossible to learn in segregated schools. A racially diverse educational setting is essential to overcoming the persistent vestiges of *de jure* segregation. Racially, culturally and socio-economically diverse schools are better equipped to provide equal educational opportunities to African-American students---as well as all students.

III. Graduates Of Integrated Schools Value Diversity In The Workplace And In Their Communities

Our members, many of whom are graduates of desegregated public schools, recognize the benefits of attending racially, culturally and socio-economically diverse schools. Indeed, attending desegregated schools often provided our members and their white classmates, a limited opportunity, if not their only opportunity, to interact with people of different racial and ethnic backgrounds. In a study of 1980 graduates of desegregated high schools, a group of researchers found that the white, African-American and Latino students interviewed believed they benefited from integrated schooling:

> Although sometimes difficult and frustrating, this experience [desegregation] yielded a valuable social education not otherwise available through books, videos, or field trips. . . The interviewees stressed the increased level of comfort they now

> have in racially diverse settings, especially when they are in the minority.
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> * * *
>
> Thus, graduates of all racial and ethnic backgrounds emphasized the importance of 'living' through integration. Furthermore, they appreciate those lessons more than ever, because they have come to realize the uniqueness of their school experiences. It was only after graduating that they understood what they had gained vis-à-vis peers who had not attended diverse schools and who seemed more prejudiced.

Amy Stuart Wells *et al.*, *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society*, Final Report from the Understanding Race and Education Study 2, 16 (2004), available at http://www.tc.columbia.edu/desegregation.

White graduates of integrated schools learned new cultural perspectives which impacted their lives years after schooling. *Ibid.* They attested to a greater appreciation for diverse cultures in high school and as such said they were "less likely to revert to stereotypical assumptions about others based on race." *Ibid.* They also emphasized a decreased fear of people of color. *Ibid.* These graduates astutely observed that their white spouses and friends who did not attend diverse schools, were often frightened in racially diverse and predominantly African-American or Latino settings. *Ibid.* As a white alumnus of a desegregated school noted:

> If you just hang out with a bunch of white people and . . . you do everything that you can to say I'm going to act like a nice, open-minded person when I get around these black folks and Mexican folks,

> you're not going to be as good at it. You're going to be more uptight. You're going to be more stressed out. It's going to be a problem.

Ibid. As a white graduate of the Charlotte-Mecklenberg school system explains, "Charlotte as a community is better for having desegregated its schools and students." *Id.* at 28. She said that if the goal is to "have cross cultural, cross racial relationships, you've got to work at it. And... the Charlotte-Mecklenburg school system did that." *Ibid.* She says that she knows more African-Americans her age in Charlotte than she would have attending an all-white school. *Ibid.*

Similarly, graduates of color in this study cited numerous benefits to an integrated educational experience. *Id.* at 16. The graduates of color attributed their ability to function in predominantly white environments to the fact that they had learned how to cope with racial prejudice at an early age. *Ibid.* Moreover, many graduates of color said they were "more at ease in a white-dominated society because they had learned that not all whites were racist." Most notably, however, due to their daily interactions with white students, graduates of color learned that they could compete with whites academically. *Id.* at 17.

The results of this study are echoed by the experience of one of our members, a graduate of Respondent Jefferson County Public Schools and a parent of a current Jefferson County high school student:

> My classes were pretty well integrated in elementary and middle school; there were usually eight black children and one or two Asian children in each of my classes. High school was different. At times, I was one of the only two black students in the class. It never really bothered me that I was

the only black person in a sea of white faces because I had always had close white friends.

I was in high school when I first encountered racial issues. For instance, I signed a petition to protest the lack of attention given to black history; and white parents consistently challenged grades given by my social studies teacher, a black male.

Throughout high school, there were challenges surrounding racial issues between black and white students. Despite these challenges and the resulting racial tensions, I appreciated attending integrated schools. I made some great friends from diverse backgrounds and had some amazing experiences. Furthermore, attending schools with diverse students helped shape me into the person I am today. It gave me the opportunity to learn from people who experience the world in a different manner as well as to teach people about myself and the experiences of black people.

Moreover, as a parent, I encouraged my daughter to befriend children who did not look like her. Happily, this is one lesson that she listened to because my daughter has always been part of a multiracial group of close-knit friends who attended the same school.

Although addressing issues of diversity can be challenging, exposing students to diverse educational environments fosters an understanding of differences and teaches students to value diverse viewpoints – essential skills needed in our global economy.

IV. Diversity in Public Schools Is A Necessity For Successful Academic And Professional Development In *All* Students

Diversity is a fundamental component to fulfilling the promise of *Brown*. All educational entrance programs must be able to include race as a factor to remedy *de facto* segregation in today's educational systems. In 2003, this Court in *Grutter* stated that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Grutter*, 539 U.S. at 330. Accordingly, the Court explicitly recognized the necessity for individuals to learn about racial and cultural differences in order to become more effective leaders and contributors to American society. Therefore, it is clear that children should be taught in diverse educational settings so they begin to comprehend and accept differences in other individuals, and themselves, at an early stage in their development. *See generally,* Beverly Tatum, *Why are All the Black Children Sitting Together in the Cafeteria?* (1997).

Diversity in classrooms enhances the quality of education for students of color and white students alike. Studies have concluded that diversity in the educational system is a necessity for successful academic and personal development in all students. *See generally* Kathryn A. McDermott, *Diversity or Desegregation? Implications of Arguments for Diversity in K-12 and Higher Education*, 15 J. EDUC. POL'Y 452 (July 2001). Indeed, these studies have determined that students learning in diverse environments have enhanced learning, higher educational and occupational aspirations, and greater social interaction with members of different racial and ethnic backgrounds. *See* Patricia Gurin *et al., The Benefits of Diversity in Education for Democ-*

ratic Citizenship, 60 J. SOCIAL ISSUES 17, 19 (2004); Michael Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Louisville* 2, 7 (2001), available at http://www.civilrightsproject.harvard.edu. The fact that students have diverse perspectives and experiences presents opportunities to engage in discussions that develop critical thinking skills. Kurleander & Yun, *supra*, at 7. This type of engagement is not accomplished merely by having contact with an individual of another race, but is best served by having genuine and meaningful interaction. Patricia Gurin, *Benefits of Diversity, supra*, at 18. These interactions additionally serve to assist students in understanding divergent perspectives and being able to have honest discourse about those differences. *Id.* at 24. Further, diverse learning environments assist in demonstrating shared values and commonalities and dismantling false and preconceived notions. *Ibid.* Ultimately, educating students in diverse environments teaches them to be receptive to differences and prepares students to become future leaders who are able to be more effective in a global workforce (*i.e.*, to be multiculturally competent). *Id.* at 32.

As with other professional careers, it is necessary that we have racial diversity at elementary and secondary school levels in order to encourage African-American students to pursue their education and, ultimately, to seek careers in the legal profession. Attaining a *juris doctorate* enables students to be productive leaders in a variety of different fields.

Furthermore, increasing the supply of African-Americans in the pipeline to the profession supports long-term diversity in law firms, corporations, government, the courts, and other professional arenas. This goal, however, cannot be accomplished without encouraging and increas-

ing the pipeline of African-American students in elementary school and secondary education. In one of his numerous studies on the issue of diversity in the classroom, Gary Orfield found that almost all of the African-American and Latino students who attended elite law schools came from integrated educational backgrounds. Orfield, *Schools More Separate, supra,* at 9. In 2004, out of the approximately 40,000 *juris doctorates* awarded in the United States, only 8,367 of these degrees were awarded to students of color. *See National Center for Education Statistics website at http://www.nces.ed.gov.* In 2005, African-Americans represented only 6.5% of all students attending law school. *See generally Law School Admission Council, http://www.lsacnet.org.* Unfortunately, there is no evidence that this disparity is decreasing. Accordingly, to address the dearth of African-American attorneys, it is imperative that the issues of lack of diversity and representation of African-Americans at the post-secondary education level be addressed at its earliest stage. In his expert report for *Grutter*, Kent Syverud, former dean of Vanderbilt University School of Law, explained the benefits of having racially heterogeneous students in law school classes. He stated:

> It has been my experience that skills instruction is enhanced dramatically for all students by the interaction in class of future lawyers of all races, and by the different and at times unpredictable viewpoints different people bring to the discussion. It is also my experience that civil democratic discourse among lawyers of all races, in public and in court, is something that, once experienced in the law school classroom, is valued outside it and across my students' careers.

Expert Report of Kent D. Syverud in *Grutter* v. *Bollinger*, No. 97-75928 (E.D. Mich.), available at www.upcomm.umich.edu/admissions/research/experts/syverud.html.

The lack of diversity in lower levels of the educational system not only affects the attendance and matriculation of African-Americans in law schools, but also affects the hiring and retention of African-Americans in law firms. Recently, the American Bar Association studied the issues facing women of color in the practice of law. *See generally* ABA Commission on Women in the Profession, *Visible Invisibility: Women of Color in Law Firms* (Aug. 2006). This study, consistent with our members experiences, corroborates our view that the experience of women of color is a difference in kind—not just degree from our peers. The study found that ["n]early half of women of color but only 3% of white men experienced demeaning comments or harassment." *Id.* at 12. The study also documented that "[n]early two thirds of the women of color but only 4 % of white men were excluded from informal and formal networking opportunities, marginalized and peripheral to professional networks within the firm." *Id.* at 13. "Forty-four percent of women of color but only 2% of white men reported having been denied desirable assignments. *Ibid.* Several of the women participating in the ABA study provided anecdotes describing their experiences in law firms. These participants explained how women of color are often excluded from professional development and client interaction at their firms based upon preconceived notions of their legal ability. *Id.* at 13. They also discussed how they were excluded from networking opportunities because other attorneys were unfamiliar with people of color. *Ibid.* One woman recalled:

> A white male in my firm worked on a transaction from the beginning to just before the closing. He

> had to leave to get married and would be gone for two to three weeks on his honeymoon. So, I stepped in and took over the closing. I worked with the client for one week. At the end of the deal the client said "Wow, you did a great job! We can forget about what's-his-name; I want you to be on our deals going forward." They had a deal in the pipeline and he mentioned it to the partner who was working on the deal. The client said, "I want [her] to work on this deal." Then the partner said, "Okay, we'll talk about that." Right away I could hear some reservation. On our way back to the airport the partner said, "Well I understand that [the client] said he wanted you to work on his next transaction. We'll definitely find a way to get you involved, to a certain extent." I never did anything on the next deal, even though the client wanted me. *Id.* at 57.

Another participant stated:

> I have not had a lot of opportunities for professional development. Junior minority associates, especially females, are required to do a lot of document review whereas our white male counterparts do more challenging assignments and a lot more writing. When I am given writing or research assignments, the assignments are usually short-term [sic] emergencies which do not create learning or development. That is why I am leaving my firm for a federal clerkship and I highly doubt I will ever return.

Id. at 62. Lastly, one woman of color described how preconceived notions of her legal ability affected her work assignments:

> I was a lateral hire and I'd significant experience as a trial litigator. They sent the partner, who was a judge, to interview the judges before whom I had tried cases, and they'd never done that with any other person that they'd hired. Black, white, men, women. The judges before whom I had tried cases came back and told me. They still put me through the ropes. It took another year before they gave me a trial, and I had more trial experience than anybody in the firm [of more than 200 attorneys]!

Id. at 64.

These experiences exemplify the challenges faced by women of color--not only at law firms, but also in the general practice of law. Moreover, the ABA study demonstrated that the culture of discrimination at law firms marginalized and excluded these women of color from receiving opportunities for advancement. This disparate treatment of women of color evidences the need for diversity in the legal practice, and in the educational system. It is imperative that the pipeline to the legal profession is maintained in order to increase the representation of people of color in the practice of law, and also to create an environment where lawyers of color do not feel isolated or disenfranchised from achieving success in their careers. Additionally, it is paramount that all students are introduced to and comfortable with the concept of diversity and differences, so that they can function in a global community. To preserve the principles of *Brown* that were upheld in *Grutter*, this Court must recognize that race is a legitimate consideration in overcoming the obstacles of *de facto* segregation and that the Equal Protection clause does not preclude the consideration of race in public school assignment policies for the purpose of integrating the schools.

CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals for the Sixth Circuit and Ninth Circuit should be affirmed.

Respectfully submitted.

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